Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-523

REPLY COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
William W. Huber

Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Fifth Floor
Washington, D.C. 20006-4103
(202) 835-8292

Its Attorneys

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EXECUTIVE SUMMARY

At this point in time, there is no issue as important to the future of wireless cable as the definition of the protected service area. Comments submitted by operators and by educators have established the critical importance of adopting WCAI's proposed definition before lifting the existing freezes on applications for new MDS and ITFS stations. Should the Commission lift those freezes without defining the protected service area in a way that truly provides protection of the area a licensee can serve, it will devastate the financial and operational underpinnings of the industry.

Limiting first window eligibility to those accumulating some critical mass of channels drew significant support from those in the wireless cable industry. Those who oppose the concept ignore the pressing need for competition to cable and the fact that only those with a critical mass of channels can provide that competition.

The comments do not support the Commission's "preferred approach" to licensing by geographic area. Those who support the concept fail to address the technological differences between MDS and other services where geographic licensing has worked successfully. In establishing service area and interference protection rules for MDS, the Commission cannot forget: (a) that if an MDS licensee is restricted in the strength of the signal that it can transmit into a neighboring area, it will be unable to serve portions of its own geographic area; and (b) that if an MDS licensee designs its facility to provide universal service within its geographic service area, it will inevitably interfere with service to an immediately adjacent geographic service area.

Finally, the Commission should assure that ITFS stations are adequately protected from new MDS facilities licensed pursuant to auction. However, the Commission should take this opportunity to eliminate associated procedural rules that unduly delay the licensing of MDS facilities.

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its reply to the comments filed in response to the *Notice of Proposed Rulemaking* ("*NPRM*") in these proceedings.[1/]

I. INTRODUCTION.

Given the vast number of the issues raised in the *NPRM*, the complexity of many of those issues, and the varied motivations of the commenting parties, it should come as no surprise that the comments do not reflect identical viewpoints. Yet, it is rather remarkable that the comments filed in response to the *NPRM* evidence a great deal of unity within the

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[1/] *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 7665 (1994)[hereinafter cited as "*NPRM*"].

wireless cable community as to how the Commission should proceed to license new Multipoint Distribution Service ("MDS") stations.[2/] As will be discussed in more detail below, the wireless cable industry has demonstrated that the best way to achieve the goal of this proceeding -- "to facilitate development of the wireless cable industry"[3/] by "allow[ing] operators to enhance their service more rapidly, providing more competition to wired cable"[4/] -- is not the "preferred approach" of the *NPRM*.

Rather, the comments establish that if the Commission is truly interested in expediting competition to cable, rather than merely maximizing auction fees, it should generally retain its existing MDS licensing system, rationalize the protected service area ("PSA") definition in Section 21.902 as WCAI has been advocating for years, and focus staff resources on those markets where operators are securing the critical mass of channels necessary to compete by restricting first filing window eligibility. In these reply comments, WCAI will supplement its initial comments and respond directly to those who have differing views as to regulatory regime that should control MDS licensing in the future.

[2/]In its comments, WCAI expressed the view that, since Section 307(j)(1) of the Communications Act limits competitive bidding to applications for initial station licenses, the Commission should continue accepting and processing MDS modification applications without regard to filing windows under the current same day filing rule embodied in Section 21.914. *See* Comments of The Wireless Cable Ass'n Int'l, MM Docket No. 94-131 and PP Docket No. 93-523, at 3 n. 8 (filed Jan. 23, 1995)[hereinafter cited as "WCAI Comments"]. A similar view was expressed by ACS Enterprises, *et al* ("ACS"). *See* Comments of ACS Enterprises, *et al*, MM Docket No. 94-131 and PP Docket No. 93-523, at 10 n. 8 (filed Jan. 23, 1995)[hereinafter cited as "ACS Comments"].

[3/]*See NPRM*, 9 FCC Rcd at 7666.

[4/]*Id.* at 7665.

II. DISCUSSION.

A. The Comments Support The Expansion Of The Protected Service Area.

Something that the Commission has ignored for far too long, but cannot afford to ignore any longer, is the need to revisit the PSA afforded wireless cable operators. There was unanimity among those addressing the issue that the Commission must adopt WCAI's proposal for a redefinition of the protected service area ("PSA") afforded existing MDS licensees.[5/]

Significantly, the need for an expanded PSA was expressed not only by wireless cable

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[5/] *See* WCAI Comments, at 10-25; ACS Comments, at 3-5; Comments of American Telecasting, MM Docket No. 94-131 and PP Docket No. 93-523, at 23 (filed Jan. 23, 1995)[hereinafter cited as "ATI Comments"]; Comments of Hardin & Associates, MM Docket No. 94-131 and PP Docket No. 93-523, at 6 (filed Jan. 23, 1995)[hereinafter cited as "Hardin Comments"]. American Telecasting, Inc. ("ATI") has proposed that the expanded PSA only go into effect after a first "critical mass" filing window. *See* ATI Comments, at 23. However, other than to assert that such an approach "is prudent," ATI does not explain what benefits would be realized by treating as non-mutually exclusive applications for new MDS stations where interference is predicted within the actual service area of one or the other. Admittedly, immediate implementation of the expanded PSA will increase the number of applications for new MDS stations filed by system operators in nearby markets being deemed mutually exclusive. However, WCAI has proposed that, prior to auction, the Commission afford mutually exclusive applicants thirty days to negotiate a settlement. *See* WCAI Comments, at 33. A similar proposal was advanced by Heartland Wireless Communications, Inc. ("Heartland"). *See* Comments of Heartland Wireless Communications, MM Docket No. 94-131 and PP Docket No. 93-523, at 11 (filed Jan. 23, 1995)[hereinafter cited as "Heartland Comments"]. This is consistent not only with the directive of Section 309(j) of the Communications Act of 1934 that the Commission continue to use negotiations to eliminate mutual exclusivity, but with ATI's own comments. As ATI correctly notes:

> Negotiation as a means of breaking application deadlocks is the established practice in the industry. Operators frequently find that the interference rules stand in the way of their plans and are forced to agree upon engineering solutions so that geographically adjacent systems can function successfully.

ATI Comments, at 23 n. 29.

operators, but also by the educational community.[6/] This is hardly surprising, since a lifting of the filing freezes without a modification to the PSA definition will have a devastating impact not only on wireless cable operators, but also on the Instructional Television Fixed Service ("ITFS") licensees from whom they lease excess capacity.[7/]

[6/] *See* Comments of Caritas Telecommunications, MM Docket No. 94-131 and PP Docket No. 93-253, at 3 (filed Jan. 23, 1995)[hereinafter cited as "Caritas Comments"]. While Caritas Telecommunications ("Caritas"), the educational telecommunications provider for the schools and parishes of the Diocese of San Bernardino, supports the concept of an expanded PSA, its specific proposals for defining an expanded PSA should be rejected.

Its first proposal, that "the service area . . . be defined as line-of-sight to the transmitting antenna with allowances for small local obstructions, while maintaining a grade "A" picture over 75 percent of the unobstructed area" would make it extremely difficult to identify the PSA of any station. *Id.* at 2. A somewhat similar approach was specifically rejected by the Commission in 1990 on the grounds that it would be overly complex to implement. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service.* 5 FCC Rcd 6410, 6419-20 (1990).

Caritas' second proposal, that the Commission establish three classes of MDS station based on effective radiated powers of 50 watts, 250 watts and 100 watts and define the PSA as having a radius of 15 miles, 30 miles and 50 miles, respectively, is similar in approach to that proposed by WCAI. *See* Caritas Comments, at 3. However, Caritas' approach is flawed in two respects. First, the relationship between the specific power ratings and PSA radii is unclear; indeed, the PSA definitions appear to have been arbitrarily chosen. By contrast, WCAI's proposed PSA definitions were derived from the very formula the Commission itself employed to determine the existing 15 mile limit. Second, by limiting MDS stations to just three classifications, Caritas would unduly restrict the flexibility afforded MDS licensees in designing their stations. WCAI, by contrast, has proposed to give each licensee total flexibility in station design (subject to the existing EIRP maximums) and provides a PSA that is tailored specifically to each possible station design.

[7/] In its discussion of MM Docket No. 93-24 at today's open meeting, there was no indication whether the Commission intends to address the proposals for expansion of the PSA prior to lifting the ITFS filing freeze. Unless the Commission does so, however, the opening of the first ITFS window will prove disastrous for wireless cable operators, as greenmailers and speculators will be able to propose stations unduly close to existing facilities.

As the Commission has recently recognized, America's educational community is heavily reliant upon the wireless cable industry to fund the construction and operation of ITFS systems.[8/] Because of funding cuts, most ITFS licensees have very little money to expend on ITFS, making every dollar received from the wireless cable industry precious. In virtually all cases, the ITFS licensee is compensated based on the number of subscribers served by the wireless cable system operator. If the Commission permits new MDS stations to be spaced unduly close to existing facilities, the number of subscribers current systems can serve will be unnecessarily reduced and lease payments to educators will diminish.

Moreover, the loss of wireless cable subscribers due to close-spacing of new MDS stations would deprive the educational community of one of the greatest benefits of the wireless/ITFS partnership -- the empowering of educators to deliver educational, instructional and cultural programming direct to distance learners at home. WCAI is in the process of conducting a survey that will quantify the degree to which that those served by ITFS are located beyond the current fifteen mile PSA boundary. Although incomplete, the preliminary results of that survey demonstrate that ITFS licensees are frequently serving receive locations far beyond the PSA boundary.[9/] It is fair to assume that if ITFS stations are serving registered

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[8/] *See Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 n. 8 (1994)("More than 90% of the recently filed ITFS applications contain excess capacity lease agreements with wireless cable operators.").

[9/] A few examples are illustrative of WCAI's preliminary findings. Of the receive sites of the ITFS stations comprising the wireless cable system in Riverside/San Bernardino, CA, 43 of 123, or 37%, are beyond the PSA. Twenty-one of the 66 receive sites, comprising the St. Louis (continued...)

ITFS receive sites at such distances, they are or soon will be used to deliver ITFS programming directly into homes similar distances from the transmit site.

B. Limiting Eligibility During The First Filing Window To Those Able To Achieve A Critical Mass Of Channels Will Expedite Service To The Public.

The comments submitted by the wireless cable community evidence overwhelming support for the proposal advanced in the *NPRM* to limit eligibility during the first filing window to those controlling some critical mass of channels, regardless of what system is ultimately employed to award licenses.[10/] Admittedly, as will be discussed below, there is some disagreement as to precisely which entities should be permitted to apply for new MDS stations during the first window. However, the lack of consensus on that nuance cannot mask the almost unanimous support for the concept of focusing the Commission's limited application processing resources on those markets where wireless cable is most likely to emerge rapidly. Indeed, the few arguments advanced against limiting eligibility during the

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[9/](...continued)
wireless cable system, 32%, are beyond the PSA. Of the receive sites comprising the Phoenix system, 34% (66 of 192) are beyond the PSA boundary. Fifty one of the 210 receive sites comprising the Houston system, or 24% are beyond the PSA.

[10/] *See* WCAI Comments, at 25-33; ACS Comments, at 14-15; ATI Comments, at 12-23; Comments of United States Wireless Cable, MM Docket No. 94-131 and PP Docket No. 93-523, at 4-7 (filed Jan. 23, 1995)[hereinafter cited as "USWC Comments"]; Comments of CAI Wireless Systems, MM Docket No. 94-131 and PP Docket No. 93-523, at 2-4 (filed Jan. 23, 1995)[hereinafter cited as "CAI Comments"]; Heartland Comments, at 6-8; Comments of Sioux Valley Rural Television, MM Docket No. 94-131 and PP Docket No. 93-523 (filed Jan. 23, 1995)[hereinafter cited as "Sioux Valley Comments"]; Comments of Vermont Wireless Coop, MM Docket No. 94-131 and PP Docket No. 93-523 (filed Jan. 9, 1995); Hardin Comments, at 9; Comments of Crowell & Moring, MM Docket No. 94-131 and PP Docket No. 93-523, at 10-12 (filed Jan. 23, 1995)[hereinafter cited as "Crowell Comments"].

first window to those controlling a critical mass of channels can be readily disposed of.

For example, one application preparation firm opposed limiting first window eligibility on the grounds that potential applicants for MDS spectrum might not desire to use that spectrum in connection with a wireless cable service.[11/] What that argument ignores, however, is that the Commission's stated goal in this proceeding is to "allow [wireless cable] operators to enhance their service more rapidly, providing more competition to wired cable."[12/] While WCAI does not suggest that the Commission require that all MDS facilities be employed for wireless cable, it is certainly appropriate for the Commission to give those proposing to compete against the entrenched franchised cable monopoly the first opportunity to secure available MDS channels.

Another application preparer complains that limiting eligibility to participate in the first window as proposed in the *NPRM* "unfairly limits some individuals who have been patiently waiting for the filing window to open so they can file in an area."[13/] That, too, misses the point of this proceeding. The goal is not to lift the MDS filing freeze so that the Commission can again be flooded with applications, it is to expedite the delivery of a competitive multichannel video programming service to the public. By limiting applications filed during the first round to those with access to the critical mass of channels necessary to provide a

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[11] *See* Comments of The Richard L. Vega Group, MM Docket No. 94-131 and PP Docket No. 93-523, at 9-10 (filed Jan. 9, 1995)[hereinafter cited as "Vega Comments"].

[12] *NPRM*, 9 FCC Rcd at 7665.

[13] Comments of Dalager Engineering Company, MM Docket No. 94-131 and PP Docket No. 93-523, at 2 (filed Jan. 9, 1995)[hereinafter cited as "Dalager Comments"].

viable wireless cable service, the Commission can best manage its own processing resources. The critical mass requirement will permit the Commission to devote its scarce processing resources initially to those best positioned to introduce competition into the marketplace immediately. Without such a limit, the Commission will find itself devoting limited resources on processing applications by those who as yet lack the critical mass of channels to succeed.

The Commission should note that WCAI is not saying that those looking to secure their first channels should be denied all opportunity to apply for vacant MDS channels. Rather, WCAI is simply saying that a limit on who can participate in the initial filing window will best achieve the Commission's goal of rapidly introducing a new multichannel video service in as many markets as possible. After the Commission processes those applications filed during the first window, it can begin accepting applications proposing to construct new MDS stations in areas where no one has yet accumulated the necessary critical mass of channels.

Similarly, the assertion by Pacific Telesis Enhanced Services ("PacTel") that limiting first window eligibility will result in "unjust enrichment" should fall on deaf ears.[14/] Not only does PacTel ignore the limited value of MDS channels in markets where a prospective operator has already accumulated a significant complement of channels, it ignores that the proposed critical mass window is intended to enrich consumers, not operators. The critical mass window is intended to remedy a decade-old MDS licensing scheme that no longer meets

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[14/] Comments of Pacific Telesis Enhanced Services, MM Docket No. 94-131 and PP Docket No. 93-523, at 4 (filed Jan. 9, 1995).

the needs of the marketplace. To the contrary, the balkanization of MDS channels among myriad licensees has been a significant cause of the slow growth of wireless cable.

Any time the Commission limits eligibility, it can be charged with "unjust enrichment." Yet, the concept of employing eligibility limits to expedite the inauguration of a service is hardly new -- on numerous occasions, some of which are cited in the *NPRM*, the Commission has imposed eligibility limits in order to expedite the initiation of service to the public or meet other policy objectives.[15/] To cite just one more example, the Commission afforded wireline carriers exclusive access to cellular telephone channels, on the grounds that such an "allocation constitutes the most practical, and quite possibly the only, way to achieve the Commission's twin goals of making quality . . . service available to the public as rapidly as possible while promoting competition whenever feasible."[16/] Ironically, an affiliate of PacTel gained cellular telephone licenses worth hundreds of millions as a by-product of that wireline set-aside. Just as PacTel would argue that there was no unjust enrichment as a result of the Commission's efforts to promote the rapid inauguration of cellular telephone service,

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[15/] Perhaps the best example of this practice is reflected in Section 74.990 of the Commission's Rules, which limits eligibility to apply for commercial licenses in the ITFS. In adopting rule changes to permit only those meeting threshold qualification standards to apply for commercial ITFS licenses, the Commission determined that its approach afforded a "reasonable expectation of prompt wireless cable service." *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6792, 6803 (1991).

[16/] *Inquiry Into The Use Of The Bands 825-845 MHZ and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 89 F.C.C.2d 58, 70 (1982).

there would be no unjust enrichment were the Commission to establish a first, critical mass window.

The very same rationales that have justified limiting eligibility in cellular and other services so as to minimize mutual exclusivity and expedite the introduction of service apply here. The Commission's focus in determining first window eligibility must remain squarely on the objective of expediting the initiation of wireless cable service to the public. In considering PacTel's objection, the Commission must keep in mind that when Congress authorized the Commission to conduct auctions, Congress specifically directed that:

> in connection with application and licensing proceedings, the Commission should, in the public interest, continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity. The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so.[17/]

It is also worth noting that whatever minor auction revenue loss the Treasury suffers from a limited eligibility rule will be more than compensated for by the significant savings consumers will realize through expedited introduction of wireless cable service.[18/] For example, a study performed by Cross Country Wireless, Inc. concluded that from 1992 through 1994, subscribers to multichannel video services in the Riverside-San Bernardino, CA

[17/] H.R. Rep. No. 103-111, 103d Cong., 2d Sess. 258, *reprinted in* 1993 U.S. Code Cong. & Admin. News 580, 585.

[18/] As the comments demonstrate, absent irrational bidding by scam artists, the revenue to be realized by the government from auctioning MDS licenses in markets where an operator is already well on its way to accumulating a critical mass of channels is likely to be quite low. *See* WCAI Comments, at 29-32; ATI Comments, at 6-7; ACS Comments, at 8.

area alone realized savings of over $41 million as a result of the competition provided by wireless cable. Similar results can be expected in most market where a viable wireless cable system launches, for there is nothing unique about the pricing, programming, or customer service in the Riverside-San Bernardino market. To achieve these results, however, the Commission must assure that, as in Riverside-San Bernardino, the wireless cable operator has access to the critical mass of channels needed to compete.

As noted above, the comments propose a wide variety of formulations for determining what entities should be entitled to participate in the first window. The Commission's objective should be to limit the first filing window to those entities that, if granted licenses for new MDS facilities, will then be positioned to promptly inaugurate service to the public.[19/] Limiting first window eligibility hardly advances the public interest if those who secure MDS licenses during the first window still lack the critical mass of channels necessary to compete effectively.

In its initial comments, WCAI proposed requiring each applicant for a new MDS station filing in the first window to demonstrate that, with the proposed MDS facilities, it would have adequate channel capacity to provide a viable wireless cable service to the public.[20/] After having reviewed the proposals advanced by others for determining first window eligibility, WCAI remains convinced that its proposal, which focuses on the number

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[19/] *See also* ACS Comments, at 14 ("The standard must be high enough to bar pretenders but must include legitimate operators.").

[20/] *See* WCAI Comments, at 27-28.

of channels an entity will have under its control at the completion of the process, has the greatest nexus to the objective of expediting service to the public.

The comments submitted by others propose that first window eligibility be linked to the number of channels an entity has under its control at the time of filing, without regard to the number of channels available. Proposed thresholds range from as few as four channels,[21] to seven,[22] to nine,[23] to ten,[24] to as many as twelve,[25] with most commenting parties proposing differing rules as to which channels should count towards the minimum.[26] The flaw in each of these proposals is that they do not ensure that the MDS applicant, if successful in securing the available MDS channels, will have sufficient channel capacity to launch its system.

It is rather obvious that, except perhaps in very rural areas without access to cable

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[21] *See* Hardin Comments, at 9.

[22] *See* Sioux Valley Comments, at 3-4.

[23] *See* ATI Comments, at 12-17.

[24] *See* Heartland Comments, at 6.

[25] *See* ACS Comments, at 14-15.

[26] For example, ATI proposes that the MDS applicant have access to nine channels that have been licensed or that are proposed in applications that have been cut-off and are unopposed, all of which must be located within 20 miles of the proposed MDS transmitter site. *See* ATI Comments, at 16. ACS, in contrast, proposes that the MDS applicant have access to four licensed channels and eight proposed channels. Unlike ATI, ACS would count all pending applications, whether or not cut-off and/or unopposed. And, unlike ATI, ACS would require that all of the channels be co-located or that applications proposing co-location be on file. *See* ACS Comments, at 14-15.

television services,[27] an entity with only four channels hardly provides the Commission with reasonable assurance that, upon licensing of fallow MDS channels, a wireless cable service will soon be launched. Indeed, even an entity with twelve channels available to it is not necessarily positioned to launch a new wireless cable service. This can best be illustrated by example.

Assume two urban markets, Market A and Market B, in each of which a prospective wireless cable operator has leased twelve channels. If in Market A those twelve channels are ITFS channels and the thirteen MDS channels are available, it can be readily seen that a grant to the prospective operator of all of the available MDS channels will likely lead to the launch of a wireless cable system. The same cannot be said however with respect to Market B if in Market B the prospective operator's twelve channels are MDS channels, leaving only one MDS channel available during the first window. Even if the prospective operator in Market B secures the one remaining channel, it still will lack the critical mass of twenty channels

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[27] In its initial comments, WCAI suggested that an applicant proposing to locate more than fifteen miles from the boundary of a Metropolitan Statistical Area ("MSA") be permitted to participate in the first filing window, so long as it has access to at least four channels at the time of application and, with the MDS channels applied for, will have at least twelve. *See* WCAI Comments, at 27-28. It has been suggested to WCAI that its proposal may encourage speculative applications at a time when the introduction of competitive Direct Broadcast Satellite services in rural markets are forcing rural wireless cable systems to expand beyond the twelve channels that was once considered acceptable. In addition, it has been suggested that WCAI's proposal could lead to a flurry of applications just outside the fifteen mile boundary that would effectively block wireless cable systems from developing in adjacent, more populated markets. While there has been insufficient time since the first round of comments were filed for WCAI to complete any analysis of the potential for abuse of its initial proposal, such an analysis is underway. WCAI will report to the Commission shortly if, based on the results of that analysis, the views expressed in WCAI's initial comments on these issues change.

necessary to compete. Thus, while the public interest in promoting competition will be advanced substantially by giving the prospective operator in Market A expedited licensing, the benefits of competition will not redound to residents of Market B.

For this reason, WCAI believes that any rule limiting eligibility to participate in the first filing window must consider the total number of channels the applicant will have under its programming control if its application is granted. In considering the comments filed by others, however, WCAI believes that one revision to its proposal would be appropriate.

WCAI initially suggested that channels for which applications are pending could be applied towards the critical mass calculation only if those applications are cut-off and not mutually exclusive.[28/] This proposal was part of WCAI's effort to provide the Commission with as much assurance as possible that the MDS applicant would have the critical mass of channels necessary to launch its system. In retrospect, WCAI fears that requiring applications to be not mutually exclusive could prove a bonanza for greenmailers. Under certain circumstances, a greenmailer would have a perverse incentive to arrange for the filing of an ITFS application that is mutually exclusive with an ITFS application sponsored by the legitimate operator. That would be true even if that greenmail application would ultimately lose under the Commission's point system for comparing ITFS applications, for the mere filing of a mutually exclusive application would prevent the legitimate operator from claiming

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[28] *See* WCAI Comments, at 28.

eligibility to participate in the first window.[29/] The greenmailer would then be positioned to demand a financial settlement for withdrawing its ITFS application, eliminating the mutual exclusivity, and affording the operator first window eligibility.

To eliminate this incentive, the Commission should permit an MDS applicant to count pending mutually exclusive applications towards the minimums needed to participate in the first window. However, no license would be issued unless and until there is a favorable resolution of the mutual exclusivity. For example, if a prospective wireless cable operator is the licensee of four MDS channels and has agreed to lease sixteen ITFS channels from entities that have pending applications subject to mutually exclusive applications, that operator should be permitted to participate in the first window. That operator should not be granted any new MDS license, however, unless and until the Commission has granted its ITFS affiliates their ITFS licenses. If those ITFS applications are dismissed or denied, the operator would lose its first window eligibility and its MDS application would be dismissed, without prejudice to re-filing in subsequent windows. This way, the Commission can assure that those who gain licenses during the first filing window have a full channel complement, while at the same time eliminating any incentive to file strike ITFS applications.

WCAI must note its disagreement with the suggestion of USWC that only those who are actually operating a wireless cable system today should be eligible to participate in the

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[29/] That such could happen is hardly fantasy on WCAI's part. The two RuralVision companies, for example, demonstrated how easy it is to get naive local educators to apply for new ITFS facilities that frustrate wireless cable system development in adjacent markets.

first filing window.[30/] Certainly, WCAI is sensitive to the concern expressed by USWC that "most of the existing MDS/MMDS license holders are unable and/or unwilling to make the kind of investment necessary to launch a competitive wireless cable system."[31/] That is the unfortunate legacy of the Commission's failed experience with lotteries to award MDS licenses. WCAI strongly believes that the rules adopted in this proceeding must minimize the risk that spectrum licensed in the first round is warehoused.

USWC's proposal for addressing this problem is flawed, however. Indeed, adoption of USWC's approach would unduly delay the inauguration of wireless cable services in many markets across the country where, because of the unavailability of MDS channels, system launches have been delayed. Assume for example, Market Z, where all of the ITFS channels have been leased to a prospective operator, but no MDS channels are available because the initial licenses have been forfeited. Most wireless cable operators would be reluctant to initiate service with so few channels.[32/] Although there is no system in operation in Market Z, WCAI believes that the goal of this proceeding -- to "result in more MDS service opportunities becoming available to the public"[33/] -- would best be achieved by allowing that prospective operator to apply for the remaining MDS channels during the first window so it

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[30/] *See* USWC Comments, at 5-7.

[31/] *Id.* at 6.

[32/] While USWC has apparently chosen to launch its Lubbock system with only sixteen ITFS channels, its comments make clear that it is having difficulty competing with so few channels.

[33/] *NPRM*, 9 FCC Rcd at 7665.

can accumulate the critical mass of channels necessary to provide consumers in Market Z a viable alternative to cable.

To achieve the anti-warehousing objective that WCAI and USWC share, the better approach is to assure that only those with reasonable prospects for achieving the critical mass of channels necessary to succeed participate in the first filing window, and then impose strict construction deadlines on those licensed during that window.[34/] In this fashion, the first filing

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[34/] In its comments, WCAI proposed a twelve month construction period for those securing MDS conditional licenses during the first MDS filing window. *See* WCAI Comments, at 32. Extensions of time should be granted only when the conditional licensee can demonstrate that it ordered equipment and otherwise took reasonable action to assure timely construction, but that construction cannot be completed due to circumstances beyond the conditional licensee's control. An uncompromising approach to extension requests is a reasonable *quid pro quo* for the benefit of participating in the first filing window.

USWC raises the specter that some MDS stations are being timely constructed, but thereafter are dismantled after a certification of completion of construction is filed. *See* USWC Comments, at 8. Unfortunately, this sort of activity appears to be occurring with alarming frequency as speculators attempt to complete construction of as many stations as possible with as little cost as possible. WCAI urges the Commission to be more aggressive in investigating when allegations of station dismantling are made, and perhaps even to commence a policy of spot checking construction when certificates of completion of construction are filed.

WCAI is concerned, however, that USWC goes too far in attacking every station that is not currently transmitting or is transmitting color bars. Where those stations are licensed to or leased by a prospective wireless cable operator that is facing regulatory delay in securing the critical mass of channels needed to compete, the Commission must adopt a lenient attitude. A policy mandating that stations begin serving subscribers upon certification of completion of construction would do grave harm to the industry, forcing operators to launch systems before they have the full channel complement needed to succeed. While WCAI is not advocating a policy of indefinite warehousing, there must be some recognition of the legitimate desire of the wireless cable operator to delay launch until sufficient channel capacity is in hand. Where questions of warehousing are raised, the Commission should take a hard look at both the licensee's efforts to utilize its channels and the status of the other channels in the market to determine whether the licensee's delay in bringing service to the public is justifiable by the unique channel accumulation problems confronting wireless cable system operators.

window will not only aid those markets where existing systems are shy of critical channel capacity, but also promote the introduction of wireless cable into new markets.

On a somewhat related topic, there is no merit to the suggestion by the Rural Wireless Cable Coalition ("RWCC") that rural telephone companies be given an exclusive first opportunity to secure available MDS channels without being subjected to auction.[35] RWCC contends that rural telephone companies "are the only entities in those regions with the ability to promptly offer wireless cable service . . .."[36] If that is true, then, as a practical matter, no rural telephone company will be subjected to an auction, for auctions only occur when mutually exclusive applications are filed. However, there are areas all across the nation where rural telephone companies have failed to develop wireless cable systems, despite the opportunities open to them. If others now desire to provide wireless cable service in a rural telephone service area, there is no reason provide the rural telephone service provider any special consideration.[37]

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[35] *See* Comments of Rural Wireless Cable Coalition, MM Docket No. 94-131 and PP Docket No. 93-523, at 4 (filed Jan. 9, 1995)[hereinafter cited as "RWCC Comments"]. Similarly, WCAI opposes the suggestion by RWCC that applications for new MDS stations in rural areas be expedited. *See id.* at 10-11. While WCAI is certainly sensitive to the concerns of rural residents, the pressing need for wireless cable services across America militates against any rural preference. However, because WCAI's proposal for limiting first window eligibility should reduce the number of applications filed during the first window, those who are accumulating the critical mass of channels needed to serve rural areas should find their applications being promptly processed in any event.

[36] *Id.*

[37] It is ironic that while RWCC supports the use of MSAs and Rural Service Areas ("RSAs") for licensing on the grounds that "by adopting an MSA/RSA approach, the FCC will encourage participation by a broader variety of service providers and thus promote competition within the (continued...)

C. A National Filing Window Will Bring Wireless Cable Service To The Public Most Rapidly And Efficiently.

The comments reflect a general consensus among the industry that while the Commission's "preferred approach" of awarding block licenses for geographic areas may work well for introducing to new services that employ cellularized network topologies operating on newly-allocated spectrum, such as like Personal Communications Services ("PCS") and the Interactive Video and Data Service ("IVDS"), it is inappropriate here.[38/] Given the substantial defects in the Commission's preferred approach, it was not surprising that the national filing window approach was vigorously supported by virtually all of the wireless cable industry.[39/]

[37/](...continued)
wireless cable industry," it is advocating special treatment for rural telephone companies that effectively precludes competition in the areas served by rural telephone companies. *See* RWCC Comments, at 10.

[38/]*See* WCAI Comments, at 3-6, 34-41; ACS Comments, at 6-9; ATI Comments, at 17-21, 24; Comments of Marshall Communications, MM Docket No. 94-131 and PP Docket No. 93-523, at 1-3 (filed Jan. 9, 1995)[hereinafter cited as "Marshall Comments"]; Heartland Comments, at 3-5; Comments of Mitchell Communications Corp., MM Docket No. 94-131 and PP Docket No. 93-523, at 4 (filed Jan. 9, 1995); Hardin Comments, at 2-6; Vega Comments, at 3-6.

[39/]*See* WCAI Comments, at 41-43; ACS Comments, at 5-13; Heartland Comments, at 5-6; ATI Comments, at 24. WCAI notes, however, its disagreement with Vega's proposal to treat all applications within fifty miles of one another as mutually exclusive. *See* Vega Comments, at 7-8. It simply is not true that stations within fifty miles of each other are necessarily electronically mutually exclusive. Nor is it true that stations more than fifty miles from each other are immune from interference. Indeed, one of WCAI's members recently encountered a situation where a proposed modification would have caused interference to a station 99.7 miles away.

Moreover, Vega's claim that "this method would not create any 'daisy-chain' problems" is patently wrong. *Id.* at 8. If Station A is within 50 miles of Station B, and Station B is within 50 miles of Station C, but Station A and C are more than 50 miles apart, there will be a classic
(continued...)

While a few commenting parties (mostly those that are not involved in the industry) supported the proposed use of geographic filing areas, those comments generally failed to address the characteristics that set MDS apart from the other services that employ geographic service areas.[40/]

For example, the comments submitted by WCAI and others established that today's analog MDS technology is incapable of providing universal service within a geographic area without emitting potentially interfering signal into adjacent areas.[41/] The record states with crystalline clarity: (a) that if an MDS licensee is restricted in the strength of the signal that it can transmit into a neighboring area, it will be unable to serve portions of its own geographic area; and (b) that if an MDS licensee designs its facility to provide universal service within its geographic service area, it will inevitably interfere with service to an

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[39/](...continued)
daisy chain. Thus, the one benefit claimed by Vega for its proposal is illusory. Moreover, any daisy-chains that do result under WCAI's approach can be readily resolved through the auction process. *See* WCAI Comments, at 5; ACS Comments, at 12; Dalager Comments, at 2.

[40/]In addition, du Treil, Lundin & Rackley, Inc. ("dLR") proposed that the Commission develop a comprehensive MDS allocation plan for the entire country. *See* Comments of du Treil, Lundin & Rackley, MM Docket No. 94-131 and PP Docket No. 93-523 (filed Jan. 23, 1995). While, in retrospect, it would have been beneficial for the Commission to have adopted such a plan at one time for MDS and ITFS so as to assure co-location of facilities within markets and optimum station placement, it is far too late in the day for such an approach. Even were it possible to develop such a plan without disturbing existing systems (and such a task would be Herculean), the wireless cable industry can hardly afford to delay the licensing of new stations while a comprehensive allocation plan is being developed.

[41/]*See* WCAI Comments, at 3-5, 39-41; ACS Comments, at 6 ("Given the architecture of MDS stations and design limitations, their signals are not, in any practical manner, capable of being confined to limited areas or within rigid geographic boundaries."); Vega Comments, at 3-6; Marshall Comments, at 2-3; Hardin Comments, at 5-6.

immediately adjacent geographic service area. Significantly, not one of the proponents for the use of geographic areas provides any discussion whatsoever of how to address this fundamental flaw in the Commission's preferred approach.[42/]

Thus, although some of those supporting the use of geographic service areas blindly cite to the Commission's use of geographic licensing for IVDS, and its proposed use of geographic licensing for Local MDS ("LMDS") and Specialized Mobile Radio ("SMR"), as governing precedent, the technical differences between those services and MDS render the Commission's prior decisions inapposite here.[43/] And, while Crowell & Moring (which has not identified the interests on whose behalf it has filed) suggests that "failure to adopt the same system used for IVDS and proposed for LMDS would leave MDS at a serious

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[42/] Indeed, of all of the comments supporting the use of geographic areas for licensing, only those submitted by CAI Wireless Systems even acknowledge the problem. *See* CAI Comments, at 4 ("analog transmission technologies . . . effectively preclude aggressive efforts to 'fill in' service throughout entire geographic areas."). Apparently, CAI believes the Commission should overlook this problem because "a designated area license approach would be most responsive to the enhanced technical flexibility that will be available to wireless operators when they transition to digital transmission systems." *Id.* at 5. While WCAI does not dispute that geographic licensing may prove the most efficient mechanism in a digital environment, the comments illustrate that the transition of the wireless cable industry to digital technology likely will take some time. *See, e.g.* WCAI Comments, at 3-5; ATI Comments, at 2-3. For this reason, WCAI believes that CAI's support for geographic licensing is premature. WCAI notes, however, that CAI is proposing a site-specific PSA, rather than a geographic area PSA, even if licenses are grouped by geographic area for purposes of conducting lotteries. *See* CAI Comments, at 7. Although even grouping applications by geographic area suffers problems of over-inclusion and of under-inclusion (*see* WCAI Comments, at 34-37), at least CAI's proposal avoids the significant problems associated with extending the PSA of an auction winner throughout the geographic area.

[43/] *See* Crowell Comments, at 2-5. Similarly, while CAI acknowledges that "as currently licensed and operated, wireless cable systems serve markets and not geographic areas," it nonetheless cites to IVDS, LMDS and SMR as precedent for utilizing an MSA/RSA licensing approach. *See* CAI Comments, at 4.

competitive disadvantage," it offers no evidence that utilizing different licensing schemes for technologically different services has any impact on the ability of one of those services to successfully compete in the marketplace.[44]

Those supporting the concept of geographic service areas also fail to address the impact of such a change on the many existing MDS licensees. In its comments, WCAI demonstrated that the Commission's approach could effectively hamper the ability of existing wireless cable system operators to adjust there service offerings to changing marketplace conditions. In particular, WCAI is concerned that adoption of the Commission's preferred approach could frustrate the industry's transition to digital technology.[45] ACS shared WCAI's concern that "existing licensees would be handcuffed by the rights of an area-wide license holder."[46] Yet, none of the proponents of wide-area licensing even address the issue, much less provide a solution.

Ironically, Crowell & Moring's comments offer one of the best reasons for rejecting the use of geographic areas for MDS licensing. In its comments, WCAI noted that adoption of the Commission's preferred approach would result in protected service areas for MDS and ITFS stations that are not co-terminus, a result that would be disastrous for the wireless cable

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[44] Crowell Comments, at 6. WCAI agrees with Crowell & Moring that "the current site-by-site licensing approach for MDS has ensured a patchwork of license areas and licensees." Crowell Comments, at 5. The best solution to that problem, however, is to license all available channels together and to give a preference to operators applying for fallow MDS channels that will be co-located with a critical mass of other MDS and/or ITFS channels.

[45] *See* WCAI Comments, at 40.

[46] ACS Comments, at 8 n.7.